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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 383

WALTER P. MACKIEWICZ and
FLORENCE B. MACKIEWICZ

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
ARGUMENT—The Court of Appeals has decided federal questions in a way in conflict with applicable decisions of this Court	10
(a) Respecting the obligation of a law officer to warn a person being questioned about his constitutional rights	10
(b) Respecting the waiver of constitutional rights under the Fourth, Fifth and Sixth Amendments	12
(c) Respecting the incompetency of one spouse to testify against the other	15
CONCLUSION	18
APPENDIX:	
A—Memorandum Decision on Defendants' Motions to Suppress Evidence of United States District Court	1a
B—Opinion of United States Court of Appeals	9a
C—Judgment and Commitment of the United States District Court	25a
D—Judgment and Order of Probation of the United States District Court	27a
E—Judgment of the Court of Appeals	29a

PAGE

Cases Cited

Escobedo v. Illinois, 278 U. S. 478 .....11, 12
Glasser v. United States, 315 U. S. 60 15
Hawkins v. United States, 358 U. S. 74 .....15, 16, 18
Jenkins v. State, 193 Ark. 842; 103 S. W. 2d 37 17
Johnson v. Zerbst, 304 U.S. 458 15
Kerr v. Clements, 148 Pa. Super. 378; 25 A. 2d 737 17
Mathis v. United States, 36 L.W. 4379 .....10, 12
Miranda v. Arizona, 384 U.S. 436 .....10, 11, 12
Peek v. United States, 321 F. 2d 934 (9th-1963) 16
Seymour v. State, 210 Ga. 21; 77 S.E. 2d 519 17
Smith v. United States, 337 U.S. 137 15
State v. Clark, 173 P. 2d 189 (Wash. 1946) 17
State v. Winnett, 48 Wash. 93, 92 P. 904 17
Stoner v. California, 376 U.S. 483 15
Taylor v. State, 220 Ark. 953; 251 S.W. 2d 588 17
United States v. Ashby, 245 F. 2d 684 (5th-1957) ... 18
United States v. Winfree, 170 F. Supp. 659 17

Constitutional Provisions

Fourth, Fifth and Sixth Amendments 2, 3, 8, 9, 14

Other Authority Cited

Witnesses 97 C.J. 2d §266 18

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case.

Opinion Below

An opinion of the District Court for the District of Connecticut on a Motion to Suppress is printed in the annexed appendix (pp. 1a-8a).

The opinion of the Court of Appeals for the Second Circuit has not been reported but is printed in the annexed appendix (pp. 9a-24a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on July 10, 1968. The petition of the defendant Florence B. Mackiewicz for a rehearing of certain of the issues and suggesting a rehearing en banc were filed in the Court of Appeals on July 24, 1968; as yet the Court of Appeals has not acted upon them. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

The case arises out of the prosecution of Walter P. Mackiewicz and his wife, Florence B. Mackiewicz, on an indictment charging evasion of income taxes in violation of Sec. 7201 of the Internal Revenue Code (Title 26, United States Code) in four counts relating to their joint income tax returns for the calendar years 1960, 1961, 1962 and 1963. After trial by jury and before Blumenfeld, D.J. a verdict was reached, finding each defendant guilty as charged.

At the outset of the income tax investigation, a Special Agent of the Internal Revenue Service obtained certain oral admissions from the defendant, Walter P. Mackiewicz, and records and documents of each defendant and made a search of their joint safe deposit box. The evidence thus obtained by the government was of an incriminating character.

The first question that arises is whether this evidence was secured in violation of the constitutional guarantees of the defendants under the Fourth, Fifth and Sixth Amendments. Questions subordinate to this are whether Walter P. Mackiewicz effectively waived his own rights under these constitutional provisions and whether he was authorized to and did waive the same rights of his wife.

The second question that arises is whether testimony of the Special Agent as to incriminatory oral admissions of the husband and financial records of his were received in evidence over the objection of the wife in violation of the common law rule rendering one spouse incompetent to testify against the other. A subsidiary question with respect to this is whether the husband was the implied agent of the wife to make the incriminating admissions.

Constitutional Provisions Involved

Such parts of the Fourth, Fifth and Sixth Amendments as are involved are as follows:

"AMENDMENT IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, * * *.

"AMENDMENT V

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

"AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Statement of the Case

Walter P. Mackiewicz was born March 10, 1920 in New Britain, Connecticut. His education ended with his first year in high school when he was sixteen and thereafter

he worked in his father's grocery store and played in a small orchestra. On December 8th, 1942, he entered the army, served overseas in Europe, in combat, and returned in November, 1945. Soon thereafter he received an honorable discharge and almost immediately married Florence Bajek. During the war she had been living in a nearby city, working in defense industries (R. 506, 518, 520, 522, 539).

In 1946 Walter opened a small grocery store in Bristol. The building he largely constructed with his own hands. On the second floor he built an apartment for his family (R. 81, 82).

In January, 1965, he and his wife and their two daughters were living in this apartment (R. 552). The business of the grocery store had substantially increased over the intervening years. The building had been enlarged and it was now called the Washington Superette. Walter remained the sole owner of it (Exhibits 1-6).

The couple had regularly filed joint income tax returns prepared by a Mr. Hoffnagle, who did that sort of work as an adjunct to his insurance business. Mrs. Mackiewicz had never been concerned with the preparation of such returns. Her husband attended to all such matters and customarily she did nothing but sign the returns when asked by her husband (R. 135, 555, 760A, 761).

Their returns for the years 1958 and 1959 had been examined by an agent who made only a minor change in a depreciation schedule for the store (R. 273).

In November, 1964, another agent, a Mr. Gardner started an audit of their returns for 1961, 1962 and 1963. About this time Mr. Mackiewicz engaged a Mr. Minella as an accountant. Mrs. Mackiewicz knew nothing about these matters other than that her husband had hired an accountant

and that a revenue agent who had been auditing a return had become ill. About this time too her husband asked her for some of her bank books or records which he usually requested at income tax time and she gave them to him without comment. She did not know such records were going to either Mr. Minella or a revenue agent (R. 92-107).

As a result of his examination, Mr. Gardner caused the case to be referred to the Intelligence Division and it was assigned to Special Agent Maurice L. Harden (R. 199).

The questions presented by this petition turn largely upon the events of January 12, 1965 when the Special Agent after conferring with Agent Gardner decided to immediately interrogate the defendant Walter P. Mackiewicz. It was the Special Agent's duty to investigate for fraud (R. 199) and he had been schooled by the Revenue Service in the technique of making the initial call on a taxpayer suspected of wrongdoing without prior notice or appointment (R. 274). So without advance notice, about noon on the day in question, the two agents arrived at the grocery store in Bristol and learned that Mr. Mackiewicz and his wife had just left to inspect a new house they were building a few miles away. The revenue agents followed them there (R. 276).

Upon finding Mr. Mackiewicz in the new house, Mr. Harden told him he wanted to ask him some questions in private (R. 398). He made it plain to Mackiewicz he wanted to talk that afternoon right after lunch. He did not tell him what the questions were about nor did he tell him that a criminal investigation had started (R. 49, 74, 277). An arrangement was made to meet in the Mackiewicz apartment. At this meeting only the two agents and Mr. Mackiewicz were present (R. 162).

First Mr. Harden exhibited an official card identifying himself as a Special Agent of the Treasury Department. The card was contained in a leather case on the outside of which a badge was pinned. The badge carried a spread eagle at the top, the initials "U.S." in the center, and around the edge the words "Special Agent United States Treasury, Internal Revenue Service." The badge also bore the numerals 2828 (R. 286-291).

Mr. Harden had with him on this occasion a form of questionnaire and instruction sheet entitled "Investigation Guide"[1] (Exh. A; Defs. Brief App. 7a) which had been designed by the Revenue Service for use in interviewing a taxpayer suspected of fraud (R. 14, 16, 277, 291). The "Investigation Guide" instructed the Special Agent to advise the taxpayer of his constitutional rights.

What happened at the beginning of the interrogation is told in Mr. Harden's own words in a memorandum he prepared (Exh. B; App. p. 1a):

> "* * * I stated that the purpose of my visit was his and his wife's failure to report all income for the years 1961 through 1963 according to Revenue Agent Gardner's computations. He was further advised that he has his constitutional rights to refuse to answer any question that he feels may incriminate himself and that he need not supply any record that in his opinion would incriminate himself. The taxpayer stated that he did not understand—so I then repeated that if he felt that any answer or record that he gives would incriminate him that he need not answer or submit those records. He then shook his head in the affirmative and said that he understood."

Mr. Harden's oral testimony confirmed this memorandum and made it plain that Mr. Mackiewicz was never told of his right of silence nor his right to counsel; and further that when Mr. Mackiewicz said he did not understand about his constitutional rights, Mr. Harden made no explanation of them, but only repeated that he did not have to answer questions or produce records he felt would incriminate himself. The Special Agent did not tell him that regardless of whether he thought a question incriminating he did not have to answer it (R. 49, 284, 285, 286).

The "Investigation Guide" had been designed to obtain information that would be helpful in applying the net worth method of reconstructing income. Although he did not know how Mr. Mackiewicz could determine whether any question was incriminating without an understanding of the "net worth" method he refrained from inquiring about it (R. 278-285). In fact Mr. Mackiewicz had no knowledge about the net worth method (R. 553, 554). Mr. Harden followed the "Investigation Guide" in interrogating the defendant; the latter answered all questions put to him not realizing that to many of them he could give no answer without forging a link in the chain of evidence the government would use to prosecute him (R. 283, 564, 656).

In time a question was reached on the "Investigation Guide" about the existence of a safe deposit box and the agent asked whether he could see it (Exh. A #54, Defs. Brief App. 7a). An inspection of a taxpayer's safe deposit box is very important in any net worth investigation and this is true regardless of what may or may not be contained in the box. The information obtained in examining the box is an important link in the chain of evidence developed by such an investigation. Regardless of what there is in a box, a taxpayer may incriminate himself by letting an agent see it (R. 392, 393). With no understand-

ing of this, Mr. Mackiewicz agreed to show the box to Mr. Harden (R. 393, 394, 554).

The agents and Mr. Mackiewicz then went to the latter's bank and the defendant obtained the box and put it on a table in the small room where the three were. The contents of the box were then shown to Mr. Harden and he made an inventory of them (R. 395, 555).

The next day the agents went to the office of Mr. Minella and there obtained some financial records and memoranda (R. 395). Mr. Minella had been told by Mr. Mackiewicz to give these documents to the agents (R. 556).

Mr. Harden never had any conversation with Mrs. Mackiewicz either on January 12, 1965 or at a later time. She was not present at the meeting between the agents and her husband. She did not hear what they said. She did not know they were going to the safe deposit box. She never authorized her husband to show the agents her records in the safe deposit box or that she had nothing else in that box or to let the agents have the records held by Mr. Minella and she never consented to her husband discussing their tax returns with Mr. Harden (R. 60, 87, 88, 89, 107, 277; Supp. R. 22-24).

Before the trial each of the defendants moved to suppress the evidence obtained as a result of the interrogation of the husband, the search of the safe deposit box and the financial records of each defendant turned over to the agents by Mr. Minella on the ground they had been obtained in violation of their rights under the Fourth, Fifth and Sixth Amendments to the Constitution. Mrs. Mackiewicz's motion set forth the additional claim that the oral statements and documents of her husband constituted testimonial utterances made by him without her consent and under common law principles could not be used as evidence against her.

After hearing on the motions, the Court (Timbers, Chief Judge) denied them in an opinion reproduced in the appendix to this brief (pp. 1a-8a).

At the trial the defendants objected to the admission of financial records of the husband and the testimony of the Special Agent concerning the husband's statements at the interrogation of January 12, 1965 on both constitutional and common law grounds. The objections were overruled, the evidence was admitted and defendants were denied the right to introduce evidence directed at the constitutional question. Also at the end of the government's case, the defendants moved to strike all such evidence on both grounds. Such motions were denied by the Court (Supp. R. 17-26; R. 158-167, 276-300, 498-502).

After the verdict, each defendant moved for a new trial thereby raising the questions presented by this petition.

Reasons for Granting the Writ

The decision below should be reviewed because the Court of Appeals has decided federal questions in a way in conflict with applicable decisions of this Court,

(a) respecting the obligation of a law officer to warn a person being questioned about his constitutional rights;

(b) respecting the waiver of constitutional guarantees under the Fourth, Fifth and Sixth Amendments;

(c) respecting the incompetency of one spouse to testify against the other at common law.

ARGUMENT

The Court of Appeals has decided federal questions in a way in conflict with applicable decisions of this Court.

(a) Respecting the obligation of a law officer to warn a person being questioned about his constitutional rights.

In *Miranda* v. *Arizona,* 384 U. S. 436, 444, the Court summarized its decision in these words:

> "• • • the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. • • • Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. • • •"

In *Miranda, supra,* the Court recognized that the vice of a custodial interrogation was its "compelling" "atmosphere", "influence" or "circumstances" and that the pressure that rendered it compelling could be psychological as well as physical (pp. 448, 449, 465, 467, 468).

In *Mathis* v. *United States,* 36 L. W. 4379, this Court rejected "the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person in custody."

The instant case does not present an actual in-custody situation as the Court of Appeals said. But it does present, as that Court did not say, a situation where the Internal Revenue Service considered a warning about constitutional rights essential and instructed the Special Agent to give such warning and to make sure the defendant understood it (Defs. Brief App. 7a).

Plainly the investigation had reached the accusatory stage; such a reference to a Special Agent occurs when there "are definite indications of fraud or criminal potential." There can be no doubt that this was the basis for the instructions to the Special Agent. A compelling atmosphere was engendered by the agent's unannounced appearance, his insistence upon a "private" interview immediately, the exhibition of his indicia of authority, the accusation inherent in the stated purpose of his visit to talk about the "understatement of income" in the returns and in the inadequate, mistaken and misleading instructions the agent gave about constitutional rights. Manifestly an investigation accusatory in nature had focused on Walter P. Mackiewicz and at very least its purpose was to obtain incriminating admissions from him. Compare *Escobedo* v. *Illinois*, 378 U. S. 478, 492.

A majority of the Court of Appeals finally rested its decision upon a harmful effect in the collection of taxes, supposedly resulting, were *Miranda* warnings required whenever a Special Agent entered a case. As Chief Justice Warren pointed out in Section IV of the *Miranda* opinion (p. 479) this argument is that "society's need for interrogation outweighs the privilege." He made it plain that constitutional rights cannot be abridged on that account and thus the conflict between the two decisions becomes abundantly clear.

Judge Feinberg of the Court of Appeals in his concurring opinion noted his disagreement with the majority over whether serious administrative difficulties would result from insistence on *Miranda* warnings. He did not foresee that result and indeed it is evident from the "Investigation Guide" in the record here (Defs. Brief App. p. 7a) that the Internal Revenue Service was following such a policy even before *Miranda*.

The warning which the agent gave the defendant was clearly susceptible of meaning that the defendant did not have to answer any questions or produce any records he did not think incriminating. The Court of Appeals disagreed. But in *Miranda* (p. 467), the Court held that a person in custody "must first be informed in clear and unequivocal terms that he has the right to remain silent."

We submit that the decision of the Court of Appeals conflicts with the decisions of this Court in the *Escobedo*, *Miranda* and *Mathis* cases.

(b) Respecting the waiver of constitutional rights under the Fourth, Fifth and Sixth Amendments.

In *Miranda* v. *Arizona*, 384 U. S. 436 at page 444, Chief Justice Warren said:

> "• • • The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."

Mr. Mackiewicz was not a well educated man; he had left high school after two years and his years afterwards with the exception of his military service had been spent working in a grocery store. The agent informed him inadequately and misleadingly about his constitutional rights. Nothing was said about his right to silence or about his

right to counsel. In answer to the agent's question, Mr. Mackiewicz said he did not understand about those rights. The agent repeated his own mistaken conception of them, without undertaking any further explanation and Mr. Mackiewicz then nodded his head affirmatively.

This is an unvarnished statement of the evidence from which the Court of Appeals drew the conclusion that

> "• • • Mr. Mackiewicz knowingly and intelligently waived whatever rights he had." (App. p. 17a)

We submit that the inference drawn by the Court of Appeals lacked any reasonable basis and fell far short of "the high standards of proof for the waiver of constitutional rights" which this Court has firmly established.

The Court of Appeals recognizing Mr. Mackiewicz's inability to truly comprehend the interrogation and its incriminating effect, said:

> "• • • the ignorance of a person being interviewed by Government agents will not always support the conclusion that he must be given *Miranda* warnings." (App. pp. 16a, 17a)

Despite this ignorance the Court held that by answering the questions, he "intelligently and knowingly" waived his constitutional rights. Further, the essential conflict between the views of the Court of Appeals and this Court appears when the foregoing statement is compared with that in the *Miranda* opinion, that in absence of an adequate warning this Court "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given" *Miranda, supra,* p. 468.

Mrs. Mackiewicz had always allowed her husband to attend to having the income tax returns prepared; also she leased a safe deposit box jointly with him. Further, she had handed him some of her own financial records without comment when he had asked for them. From this conduct, the Court of Appeals concluded:

> "Mr. Mackiewicz was his wife's agent in this field in January, 1965, for better or worse, no matter where this agency might lead." (App. p. 20a)

Thereby the Court held that Mr. Mackiewicz on January 12, 1965 was authorized to waive his wife's rights under the Fourth, Fifth and Sixth Amendments and further to make incriminating statements to the Special Agent which, despite the common law rule about anti spousal testimony, would be admissible against her in evidence. Thus under the decision of the Court of Appeals, the defendant Florence B. Mackiewicz lost the constitutional and common law rights to which she was entitled during the afternoon of January 12, 1965 despite these facts, viz. such rights were never in her mind, she was wholly ignorant of them; no person mentioned or explained them to her or told her their continued existence was at stake, and she said nothing or did nothing that related to them.

We further submit the rulings of the Court of Appeals are in conflict with not only the *Miranda* decision but with the decisions of this Court from which we quote below:

> "* * * It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has

been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Black J. in *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

"To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." Murphy, J. in *Glasser* v. *United States*, 315 U. S. 60, 70.

"* * * Waiver of constitutional rights, however, is not lightly to be inferred. * * *" Reed, J. in *Smith* v. *United States*, 337 U. S. 137, 150.

"* * * rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency * * *." Stewart, J. in *Stoner* v. *California*, 376 U. S. 483, 488.

(c) Respecting the incompetency of one spouse to testify against the other.

The decision of this Court in *Hawkins* v. *United States*, 358 U. S. 74 established the principle that one spouse is not competent to testify against the other "in a trial where life and liberty is at stake." The Court acted in the belief

> "that such a policy was necessary to foster family peace, not only for the benefit of husband and wife and children but for the benefit of the public as well."

At the trial of this case, the government introduced as evidence against the wife testimony of the Special Agent relating to incriminating oral admissions of the husband

as well as financial records of the husband. This was done without the consent of the wife and over her objection that such evidence constituted testimonial utterances of the husband not admissible against her under *Hawkins* v. *United States, supra.*

The Court of Appeals held such evidence admissible explaining that because the Special Agent and not the husband had testified about the admission, the domestic peace of the family had not been jeopardized. In further explanation it said

> "* * * Nor is there a chance that marital frictions will be aggravated, 33 *Tul. L. Rev.* 884, 890-892 (1959) for there is the convenient buffer of a third person actually making the remarks." (App. p. 22a).

This ruling of the Court of Appeals conflicts with *Hawkins* v. *United States, supra,* and is opposed to the whole current of judicial authority.

In *Peek* v. *United States,* 321 F. 2d 934 (9 Cir. 1963); cert. denied 376 U. S. 954, the Court of Appeals said at page 943:

> "* * * What remains is the rule that a husband or wife cannot be *compelled* to testify *against* his or her spouse, and cannot be *permitted* to do so unless the other spouse consents. This rule is one of privilege, and the privilege may be waived. *Olender* v. *United States,* 9 Cir. 1954, 210 F. 2d 795, 42 ALR 2d 736. And this privilege includes the prohibition against a third person relating a statement made by one spouse against the other which that spouse would not be allowed to relate if called as a witness. See *United States* v. *Winfree,* E. D. Penn 1959, 170 F. Supp. 659."

The Supreme Court for the State of Washington in *State* v. *Clark*, 173 P. 2d 189, (Wash. 1946) said at page 193:

> "We do not believe that it is proper to permit a third person to relate a statement made by one spouse against the other which that spouse would not be allowed to relate if called as a witness. Testimony should not be permitted to enter through the back door which the statute forbids to enter through the front door. *State* v. *Winett*, 48 Wash. 93, 92 P. 904."

In *United States* v. *Winfree*, 170 F. Supp. 659, the District Court had before it a Motion to Suppress evidence in an income tax evasion case. A husband had been indicted and his estranged but not divorced wife had voluntarily made certain statements to Internal Revenue officers relating to his income tax matter. The motion to suppress was denied, obviously because the evidence had not been illegally obtained, but the Court made it plain that such evidence could not be used on the trial because of the spousal relationship. It said at page 661:

> "The above stipulated facts, together with the following facts which have been assumed by the trial judge, *show the applicability of the policy stated in the Hawkins case, supra, if any attempt is made to have Mrs. Winfree testify at the trial or to have any agent repeat the extra-judicial statements made by her on issues concerning her husband's guilt.*" (emphasis added)

Other authorities opposed to the ruling of the Court of Appeals are:

> *Taylor* v. *State*, 220 Ark. 953; 251 S. W. 2d 588;
> *Jenkins* v. *State*, 193 Ark. 842; 103 S.W. 2d 37;
> *Seymour* v. *State*, 210 Ga. 21; 77 S.E. 2d 519;
> *Kerr* v. *Clements*, 148 Pa. Super. 378; 25 A. 2d 737.

We have found no decision supporting the ruling of the Court of Appeals. The case of *United States* v. *Ashby*, 245 F. 2d 684 (5 Cir. 1957) cited by the Court is not relevant because it does not deal with the competency of one spouse to testify against the other. Rather it is concerned with the privilege accorded private or confidential communications between spouses analogous to the privilege communications between attorney and client enjoy. See Witnesses 97 C.J. 2d §266 *et seq.* This is an entirely different principle not involved here and hence *United States* v. *Ashby, supra,* is not a pertinent authority.

The Court of Appeals also held that the husband had "implied authority" from his wife to talk to the Special Agent and make the admissions, but we have shown in the point preceding this that there was no basis for implying such authority and that in doing so, the Court of Appeals was violating repeated injunctions of this Court.

The allowance of the testimony of the Special Agent concerning the husband's admissions against the defendant wife and the use of the husband's own financial records against her conflicted with *Hawkins* v. *United States, supra.* If not in direct conflict because the admissions were proven by testimony of the Special Agent rather than directly by the husband, the matter constitutes an important question of federal law which has not, but should be settled by this Court.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CURTISS K. THOMPSON
Attorney for the Petitioners.

APPENDIX A

Memorandum Decision on Defendants' Motions to Suppress Evidence of United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

—VS.—

WALTER P. MACKIEWICZ and FLORENCE B. MACKIEWICZ

APPEARANCES:

Samuel J. Heyman, Esq., Asst. U. S. Atty., New Haven, Conn. (Jon O. Newman, Esq., U. S. Atty., Hartford, Conn., on the brief), for the United States.

Curtis K. Thompson, Esq., of Thompson, Weir & Barclay, New Haven, Conn., for defendants.

QUESTION PRESENTED

Defendants, husband and wife, are charged in a four count indictment filed April 11, 1967, with income tax evasion in violation of 26 U.S.C. § 7201 by reason of alleged knowing understatement of income in their joint returns for each of the years 1960-1963. The central issue raised by defendants' motions to suppress evidence, pursuant to Rule 41(e), Fed. R. Crim. P., is whether defendant Walter

Appendix A

P. Mackiewicz freely and voluntarily cooperated with federal authorities in furnishing certain information as to the state of defendants' financial affairs while under investigation for the years in question by agents of the Internal Revenue Service.

The Court holds that the facts in this case reveal an entirely voluntary course of conduct on the part of defendant Walter P. Mackiewicz; accordingly, there can be no valid claim of violation of constitutional rights, and the instant motions are denied.

FACTS

The following facts are not in dispute.

Defendants, residents of Bristol, Connecticut, filed joint income tax returns for the years 1960 through 1963.

In the fall of 1964, defendants' returns were under examination by Wilbur Gardner, an agent in the Audit Division of the Internal Revenue Service. Mr. Mackiewicz had engaged an accountant, Samuel Minella, and furnished relevant records to Minella for inspection by Gardner. Among such records were records previously kept separately by Mrs. Mackiewicz and delivered by her to her husband at his request; informed of the disposition of those records, Mrs. Mackiewicz never sought their return or attempted to limit their use.

As a result of his investigation, Gardner considered there to have been a significant understatement of income, and the matter was referred to the Intelligence Division of the Internal Revenue Service.

On January 12, 1965, Gardner and Maurice L. Harden, an agent of the Intelligence Division, proceeded to the Mackiewicz home to seek an interview. The two men found

Appendix A

Mr. Mackiewicz at the building site of the couple's uncompleted new home; Harden identified himself and told Mr. Mackiewicz that he would like to ask him some questions. It was agreed that the agents would meet Mr. Mackiewicz later in the day at the Mackiewicz apartment over the family's grocery store in Bristol.

At the second meeting that day, Harden informed Mr. Mackiewicz that the purpose of the visit was to investigate defendants' failure to report all their income for the years 1961 through 1963. Harden then informed Mr. Mackiewicz that he was not required to respond to any questions or to furnish any records that he felt might be incriminating. Mr. Mackiewicz stated that he did not understand; Harden repeated his explanation, and Mr. Mackiewicz then indicated that he did understand. No mention of a right to counsel was made, and Mr. Mackiewicz did not mention any desire to seek an attorney's advice.

Mr. Mackiewicz proceeded to make full and cooperative response to Harden's questions; he did not seek in any manner to delay or cut short the interview, and did not refuse to answer any question propounded. No threats or promises of any sort were made by Harden. Defendant was not under arrest, nor was his freedom of movement restricted in any fashion.

In the course of the interview, Mr. Mackiewicz was asked if his business books and records would be made available, and defendant replied that the books and records were at the agent's disposal, and could be obtained from Minella.

Harden also asked at that time to see the Mackiewicz safe deposit box, of which the husband and wife were joint lessees, and Mr. Mackiewicz freely consented. The

two agents then accompanied Mr. Mackiewicz to his bank in Bristol, and the box's contents were inventoried.

The next day, January 13, 1965, Harden examined the books and records made available to him by Minella. At no time was any objection interposed by either Mr. or Mrs. Mackiewicz.

Claims of the Parties

Defendants contend that all evidence obtained by means of the interviews of January, 1965 should be suppressed for the reason that no intelligent and knowing waiver of basic Fourth, Fifth and Sixth Amendment rights was made by Mr. Mackiewicz; it is additionally contended that, with respect to Mrs. Mackiewicz, no such waiver of her rights could be made by her husband.

It is the government's contention, on the other hand, that the circumstances involved disclose a fully voluntary series of acts by Mr. Mackiewicz; as to the evidence pertaining to Mrs. Mackiewicz gathered thereby, it is contended that sufficient right of control over the critical effects was in the husband so that his consent was valid against the wife.

Opinion

I. *Oral Statements by Defendant Walter P. Mackiewicz*

The Court can find no basis for suppression of statements made by Mr. Mackiewicz during the course of his interview with agent Harden on January 12, 1965, since that interview was accomplished through clearly voluntary cooperation on the part of the defendant with full knowlegde of his right to silence in the face of a criminal investigation.

Appendix A

A possible failure by agents of the Internal Revenue Service to employ the cautionary measures set forth in *Miranda* v. *Arizona*[1] is not relevant to disposition of the instant motions, since the procedural safeguards therein prescribed have application only to a suspect taken into custody "or otherwise deprived of his freedom of action in any significant way."[2] The critical factor of custodial interrogation is not present in this case, involving simply an interview with a person in his own home, and the Court is therefore not at liberty to require a demonstration that the rules laid down in *Miranda* have been observed.[3] Confronted with a wholly voluntary series of statements delivered in a context devoid of any indication of coercion, it is not appropriate for this Court to find applicable thereto as a pre-condition to admissibility adherence by government agents to a formal mode of procedure devised as a safeguard for situations in which compulsion is inherent.[4]

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[1] 384 U. S. 436, 444-445, 479 (1966).

[2] *Miranda* v. *Arizona*, *supra* n. 1 at 444. This includes, of course, the incidence of the right to counsel. See *Miranda* v. *Arizona*, *supra* n. 1, n. 4 at 444; *Escobedo* v. *Illinois*, 378 U. S. 478, 490-91 (1964); see also *Rickey* v. *U. S.*, 360 F. 2d 32, 33 (9th Cir. 1966), *cert. denied*, 385 U. S. 835 (1966); *Kohatsu* v. *U. S.*, 351 F. 2d 898, 901-902 (9th Cir. 1965), *cert. denied*, 384 U. S. 1011 (1966).

[3] See *U. S. Bottone*, 365 F. 2d 389, 395 (2d Cir. 1966), *cert. denied*, 385 U. S. 974 (1966); see also *U. S. ex rel. Molinas* v. *Mancusi*, 370 F. 2d 601, 603 (2d Cir. 1967), *cert. denied*, 35 U.S.L.W. 3343 (March 27, 1967); cf. *Hoffa* v. *U. S.*, 385 U. S. 293, 303-304 (1966); *U. S.* v. *Knohl*, 2d Cir. slip op. 2579 at 2605-2606 (June 22, 1967).

[4] It would seem especially imprudent for a District Court to initiate such an extension of the principles of *Miranda*, see *U. S.* v. *Carlson*, 260 F. Supp. 423, 427 (E. D. N. Y. 1966), *U. S.* v. *Davis*, 259 F. Supp. 496, 498 (D. Mass. 1966), since suppression of evidence pursuant to Rule 41(e) on such novel grounds would not be appealable. See *DiBella* v. *U. S.*, 369 U. S. 121 (1962); *Carroll* v. *U. S.*, 354 U. S. 394 (1957). But compare *U. S.* v. *Turzynski*, 67-2 U.S.T.C. ¶9489 (N. D. Ill. 1957).

In short, given defendant's own decision to cooperate, there is no constitutional bar to the admission of his oral statements in evidence.[5]

II. *Search and Seizure of Documents*

Defendants' financial records and safe deposit box were not examined pursuant to a search warrant. The government therefore has the burden of establishing voluntary consent, free from duress or coercion, an unequivocal, specific, and intelligently given consent.[6]

While such consent is not to be lightly inferred,[7] it is clearly present in this case. The tax investigation did not involve the slightest trace of trickery or deception; in addition to the warning to both defendants considered inherent in the original commencement of the joint return audit.[8] Mr. Mackiewicz was expressly advised of the purpose of the continued investigation, and was warned that he need not furnish any materials which he might feel were incriminating, Mr. Mackiewicz had a number of opportunities to raise objections or to withdraw his cooperation; he did neither. There is no evidence or persistent demands or other forms of coercion on the part of the agents, or of

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[5] In view of possible conflict between an asesrtion of the marital privilege, see *Hawkins* v. *U. S.*, 358 U. S. 74, 75-79 (1958), and an ultimate finding of agency as between husband and wife, see 8 Wigmore, Evidence § 2232(1) (McNaughton rev. 1961), the precise scope of such statements' admissibility is best left for determination at the trial.

[6] See *U. S.* v. *Thompson*, 356 F. 2d 216, 220 (2d Cir. 1965), *cert. denied*, 384 U. S. 964 (1966); *U. S.* v. *Smith*, 308 F. 2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U. S. 906 (1963).

[7] *U. S.* v. *Viale*, 312 F. 2d 595, 601 (2d Cir. 1963), *cert. denied*, 373 U. S. 903 (1963).

[8] See *U. S.* v. *Sclafani*, 265 F. 2d 408, 414-415 (2d Cir. 1959), *cert. denied*, 360 U. S. 918 (1959).

the least reluctance on the part of the defendant. In such circumstances, the Court must conclude that there was voluntary and effective consent.[9]

Furthermore, it is plain that the husband's consent validated the search and seizure of the records and effects of Mrs. Mackiewicz. Husband and wife were joint lessees of the safe deposit box; the other records of Mrs. Mackiewicz had been unreservedly delivered to her husband, and no subsequent objections or limiting instructions were given by her when she learned that the records were to be examined for purposes of the joint tax return audit. With joint and equal right of access to the safe deposit box, and unchallenged and unfettered possession of and control over the couple's records, Mr. Mackiewicz had full authority to consent to the searches and seizures carried out by the agents.[10] Such consent was granted voluntarily, and the fruits of the consequent searches may not be suppressed.

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[9] See, e.g., *U. S.* v. *Thompson, supra* n. 6 at 220. It should be noted that Mr. Mackiewicz was better informed of his rights than most taxpayers deemed to have acted voluntarily in delivering their records for tax investigation. See, e.g., *Greene* v. *U. S.*, 296 F. 2d 841, 842-843 (2d Cir. 1961), *vacated and remanded with instructions to dismiss the appeal*, 369 U. S. 403 (1962) (disposition of motion to suppress held non-appealable in *DiBella* v. *U. S., supra* n. 4); *Grant* v. *U. S.*, 291 F. 2d 227, 228-229 (2d Cir. 1961), *vacated and remanded with instructions to dismiss the appeal*, 369 U. S. 401 (1962) (same reason); *U. S.* v. *Sclafani, supra* n. 8 at 414-415; see also *Kohatsu* v. *U. S., supra* n. 2 at 902; *U. S.* v. *Spomar*, 339 F. 2d 941, 942-943 (7th Cir. 1965), *cert. denied*, 380 U. S. 975 (1965).

[10] See, e.g., *Drummond* v. *U. S.*, 350 F. 2d 983, 989 (8th Cir. 1965), *cert. denied*, 384 U. S. 944 (1966); *Nelson* v. *California*, 346 F. 2d 73, 77 (9th Cir. 1965); *cert. denied*, 382 U. S. 964 (1965); *Burge* v. *U. S.*, 342 F. 2d 408, 413-414 (9th Cir. 1965), *cert. denied*, 382 U. S. 829 (1965); *Sartain* v. *U. S.*, 303 F. 2d 859, 862-863 (9th Cir. 1962), *cert. denied*, 371 U. S. 894 (1962); *U. S.* v. *Eldridge*, 302 F. 2d 463, 465-466 (4th Cir. 1962); *U. S.* v. *Sferas*, 210 F. 2d 69, 74-75 (7th Cir. 1954), *cert. denied*, 347 U. S. 935 (1954); see also *Roberts* v. *U. S.*, 332 F. 2d 892, 896-897 (8th Cir. 1964), *cert. denied*, 380 U. S. 980 (1965); *Woodward* v. *U. S.*, 254 F. 2d 312, 313 (D. C. Cir. 1958), *cert. denied*, 357 U. S. 930 (1958); cf. *U. S.* v. *Walker*, 190 F. 2d 481, 483 (2d Cir. 1951), *cert. denied*, 342 U. S. 868 (1951); *U. S.* v. *Pugliese*, 153 F. 2d 497, 499 (2d Cir. 1945) (dictum).

Appendix A

CONCLUSION

The undisputed factual record in this case having disclosed no violation of defendants' constitutional rights, defendants' motions to suppress evidence, pursuant to Rule 41(e), Fed. R. Crim. P., are denied.

Dated at New Haven, Connecticut, this 22nd day of August, 1967.

WM H. TIMBERS
WILLIAM H. TIMBERS
Chief Judge

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 507—September Term, 1967.

(Argued May 15, 1968 Decided July 10, 1968.)

Docket No. 32145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

WALTER P. MACKIEWICZ and FLORENCE B. MACKIEWICZ

Defendants-Appellants.

Before:

MOORE, HAYS and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court of Connecticut, M. Joseph Blumenfeld, *Judge*, founded on a jury verdict finding defendants guilty of income tax evasion.

Affirmed.

CURTIS K. THOMPSON, New Haven, Connecticut,
for defendants-appellants.

Exhibit B

JON O. NEWMAN (United States Attorney for the District of Connecticut, Hartford, Connecticut), *for plaintiff-appellee.*

MOORE, *Circuit Judge*:

Walter P. Mackiewicz and his wife, Florence Mackiewicz, were convicted before a jury of income tax evasion on their joint returns for the years 1960, 1961, and 1962 and 1963. Int. Rev. Code of 1954, §7201. To establish unreported taxable income, the Government relied on the net worth and expenditure method. This is a technique whereby the annual increment in asset value is compared to the reported income. The Government contends that there was a discrepancy; that the Mackiewiczes understated their grocery store revenue in their receipt books by about $400 a week; and that over the period involved there was unreported income of some $20,000 a year for a total of approximately $84,000. By way of defense, Mr. Mackiewicz claimed that the excess arose from a cash hoard, black marketeering overseas, success with dice on his troop ship coming home, gambling at casinos and repayments of loans by relations and associates. The jury apparently rejected these explanations. Both Mr. and Mrs. Mackiewicz appeal. The appellate issues before us do not concern the facts as such but the methods used by Internal Revenue Agents to obtain these facts.

I.

Mr. Mackiewicz owned a small grocery store which he and his wife managed. The work was divided between them, although there was evidence that the majority of

the entries in the receipt books were made by Mrs. Mackiewicz.

In November, 1964, Agent Gardner (of the Audit Division of the Internal Revenue Service) began an audit of their joint returns. To assist him, Mr. Mackiewicz retained an accountant, Mr. Minella, and he turned over his business and personal records to him. These included the grocery store account books. Moreover, in December, 1964, he asked his wife for her personal records, which she normally kept in a desk drawer. These included savings account books, personal account stubs, personal account records, and a mutual fund document. She willingly gave these papers to her husband, for he often asked for them at income tax time. In fact, Mrs. Mackiewicz never concerned herself with the preparation of their annual joint return. She left the entire matter in the hands of her husband and she merely signed whatever tax papers he presented to her. When she discovered that he had given these personal records to an accountant for the purpose of assisting Agent Gardner, she said nothing.

In the course of his investigation, Agent Gardner ascertanied that the Mackiewiczes' deposits exceeded their business income. He therefore referred the case to Special Agent Harden (of the Intelligence Division of the Internal Revenue Service.)

On January 12, 1965, the two agents went to the Mackiewiczes' store in order to interview Mr. Mackiewicz. They were told that he was at a new building site, so they drove there hoping to find him. Mr. Mackiewicz was at the site, and the three arranged to have an interview that very afternoon.

Appendix B

At 1:30, Mr. Mackiewicz invited the agents into his home for the interview. Agent Harden displayed his badge and advised Mr. Mackiewicz that he was making an inquiry into certain tax deficiencies on his and Mrs. Mackiewicz's joint return. He further told Mr. Mackiewicz that he did not have to answer any questions or produce any documents which might incriminate him. The agent repeated this, and Mr. Mackiewicz indicated, by an affirmative nod, that he understood. The agent never mentioned that Mr. Mackiewicz could call an attorney.

Agent Harden then proceeded to ask Mr. Mackiewicz a series of questions, taken from a lengthy questionnaire supplied him by the Internal Revenue Service for use in investigating a taxpayer suspected of fraud. Many of the questions were designed to enable the agent to fashion a net worth theory of evasion. Since he was ignorant of this theory, Mr. Mackiewicz did not understand the potential import of the questions.

Mr. Mackiewicz answered, in a very responsive and cooperative manner, most of the questions. Moreover, at the request of the agents, he took them to the bank and allowed the agents to inventory the materials in the safe deposit box which he and his wife owned jointly. It included several bonds, stock certificates and some cash. Mr. Mackiewicz also instructed Mr. Minella to permit Agent Harden to examine all the family business and personal records. Mrs. Mackiewicz was not present at the interview, nor was she aware that her husband was showing their private papers to the agents.

II.

Mr. Mackiewicz claims that his constitutional rights were violated under the Fourth [e.g., *United States* v. *Blalock*,

Appendix B

255 F. Supp. 268 (E. D. Pa. 1966); 67 Colum. L. Rev. 130 (1967)], Fifth [*Miranda* v. *Arizona*, 384 U. S. 436 (1966)], and Sixth [*Escobedo* v. *Illinois*, 378 U. S. 478 (1964)] Amendments for at the January 12, 1965 interview he was not told of his rights as enunciated in *Miranda*. However, we believe that *Miranda* does not apply in the circumstances of this case and that Mr. Mackiewicz unequivocally, specifically and intelligently, *United States* v. *Smith*, 308 F. 2d 657, 663 (2 Cir. 1962), *cert. denied*, 372 U. S. 970 (1963), consented to answer the questions and to the asserted search and seizure of the documents.

Mr. Mackiewicz contends that on January 12th the inquiry as to his tax deficiencies had shifted from the investigatory to the accusatory stages, *Escobedo v. Illinois*, *supra*, at 482, and that the conduct of the agents established an atmosphere of custodial interrogation, *Miranda* v. *Arizona*, *supra*, at 444. Reliance is placed on the following facts: (1) The civil investigator had referred the case to a Special Agent. This is done when there are "definite indications of fraud or criminal potential." *Mathis* v. *United States*, 36 LW 4379, 4380, n. 2 (1968) (dissenting opinion); *Turzynski* v. *United States*, 268 F. Supp. 847 (N. D. Ill. 1967). (2) The agents' actions established an atmosphere of urgency. Moreover, they displayed their authority in such a manner as to put Mr. Mackiewicz on the defensive. He claims that he felt it was not merely an interview, but an inquisition in which he knew that he was faced by representatives of the Government who could demand, if necessary, an inspection of his records, documents, and papers. Int. Rev. Code of 1954, §7602. Mr. Mackiewicz claims that although not technically under arrest, he felt constrained to cooperate. (3) The asking of apparently innocuous questions was "insidious and dis-

honest," *Turzynski* v. *United States, supra,* at 851, for Mr. Mackiewicz claims that he had no way of knowing that these questions might later incriminate him. He didn't know of the net worth theory of proving income, and it is probable that even if he had, he would have been unable to imagine how the questions and answers could be used to build the Goverment's case. Thus, he was tricked into supplying the Government with the incriminating evidence. As one experienced tax attorney has said:

> "The agents are understandably circumspect in their questioning of the taxpayer. Early in their careers, they have learned that it is easier to catch flies with molasses than with vinegar. They do not wish to antagonize the taxpayer or alarm him unduly . . . For all these reasons they are pleasant in their relationship with the taxpayer, they do not confront him with incriminating evidence, and he is often lulled into a false sense of security." Avakian, "Rights and Remedies of Taxpayers Suspected of Fraud," 33 *Taxes* 878, 879,-880 (1955).

We are aware that in certain circumstances administrative investigators may infringe upon a private citizen's constitutional rights. However, in this case, the circumstances were such that it was unnecessary for the agents to supply Mr. Mackiewicz with the full-blown *Miranda* warnings. To some extent, a taxpayer must watch out for himself. *Morgan* v. *United States,* 377 F. 2d 507, 508 (1 Cir. 1967). This is such a case.

Thousands of inquiries are made annually by our tax investigators. They must be carried off with some dispatch and efficiency. To inject the full *Miranda* warning at this stage of the proceedings would merely clutter an

already difficult administrative task. Furtherfore, if *Miranda* warnings were required, the Service might have to supply financially indigent taxpayers with attorneys to assist and advise them. *Morgan* v. *United States, supra,* at 507. This obviously would hinder the efficient collection of our taxes.

The prevention of dilatory behavior and administrative overload is an important interest. In *United States* v. *Powell,* 379 U. S. 48 (1964), the Supreme Court held that the Internal Revenue Service does not have to show probable cause for a subpoena; it based its decision, *inter alia,* on the danger of increased dilatory action by taxpayers and the increase in the administrative load. These considerations are equally valid here.

More specifically (in response to Mr. Mackiewicz's contentions), we do not believe that the mere referral of a case to a Special Agent changes the focus of the case enough to generate the necessity of *Miranda* warnings. Although a few cases have argued that this referral is a decisive step, *Turzynski* v. *United States, supra,* the Supreme Court has indicated that the precess is more gradual. In *Mathis* v. *United States, supra,* the Court hold that under the circumstances of that case, the taxpayer was entitled to *Miranda* warnings as early as the routine tax investigation by a civil agent. It thus rejected any formalistic reliance on the official title of the investigator. As the Court said at 4380: " • • • there [is] always the possibility during his investigation that his work would end up in a criminal prosecution." To draw a precise line would discourage the Service from having any special investigators and it would encourage civil investigators to expand their inquiries. 33 *U. Chi. L. Rev.* 134, 147-48

(1965). Furthermore, regardless of the official title of the agent, it would be administratively impossible for the Service to forewarn a taxpayer every time its suspicions, based on changing evaluations of the changing evidence, shifted.

Secondly, we do not believe that the atmosphere was so charged that it was tantamount to an actual in-custody investigation. We base our decision, not on a technical and unrealistic view of the custody requirement, *Mathis* v. *United States, supra,* but on the totality of the circumstances present at the interview. There was little that was hostile or inherently coercive here. The taxpayer had the interview in his own home. *Schlinsky* v. *United States,* 379 F. 2d 735 (1 Cir.), *cert. denied,* 389 U. S. (1967). He was free to come and go as he wished. He was free to ask the agents to leave. To hold this atmosphere coercive would be equivalent to holding all interviews between an individual and a Government agent coercive. *Frohmann* v. *United States,* 380 F. 2d 832 (8 Cir.), *cert. denied,* 389 U. S. 976 (1967); *see generally,* Mertens, *Federal Income Taxation* §55A.21.

Thirdly, we do not think that the agents' actions were insidious and dishonest. Most frequently, an agent is never sure of the theory he is developing until the facts have been discovered. Therefore, the fact that he has not explained the thrust of his questions to the taxpayer does not necessarily bear on his motive and intent. And in this case, there is no evidence that the agents acted dishonestly.

Thus, this is a case where Mr. Mackiewicz's claim rests fundamentally on his own awareness of the possible significance of the questions and answers. However, the ignorance of a person being interviewed by Government

agents will not always support the conclusion that he must be given *Miranda* warnings. Such a rule would be too illusory to form a rational and practical basis for administrative action. Where there are no other coercive, extraneous factors, evidence voluntarily given should not be suppressed. *United States* v. *Mancuso*, 378 F. 2d 612 (4 Cir. 1967).

Mr. Mackiewicz argues further that even if the full *Miranda* warnings needs not be given, the partial warnings actually given in this case were misleading. He claims that in telling that he need not answer questions which might incriminate him, the agents implied that he had to answer all other questions. This was particularly unfair here, he argues, if viewed from the perspective of a taxpayer unaware that these were criminal investigations and that answers to the apparently innocent questions could later incriminate him. We disagree.

Parenthetically we note that there was no proof that the agents intended to mislead Mr. Mackiewicz. Furthermore, the warnings given do not necessarily convey the implications asserted by him. A reasonable interpretation of the warning would be exactly what it says. Thus, since the full *Miranda* warnings were unnecessary, this partial advice, offered without proof of a dishonest intent, was not so misleading as to be unfair to the defendant.

Finally, we conclude that Mr. Mackiewicz knowingly and intelligently waived whatever rights he had. He indicated that he understood the warning the agents gave him. His answers to the questions asked him were responsive and he cooperated in every way possible. He actively assisted the agents by giving them the family records in the safe deposit box and in the hands of the accountant. Under

these circumstances, we believe that he unequivocally and freely consented to the searches and seizures and he intelligently and knowingly agreed to answer the agents' questions.

III.

Even if we should find that the Service did not violate Mr. Mackiewicz's constitutional rights (as we have), Mrs. Mackiewicz contends that the search of the jointly held safe deposit box and the seizure of her records (which she had given to her husband) infringed on and violated her Fourth Amendment rights. In essence, she claims that a personal, direct waiver is necessary and, since she did not explicitly authorize her husbands' consent or the agents' actions, there was no relinquishment of her rights.

The Fourth Amendment was originally based on a property concept, 79 Harv. L. Rev. 1513, 1516 (1966), and therefore many courts, adopting this premise, have held that a search and a seizure is reasonable if the party in possession and control of the property consents. Mascolo, "Inter Spousal Consent to Unreasonable Searches and Seizures," 40 *Conn. Bar Journal,* 351, 397 n. 118. However, over the years the concept has developed into a personal privilege. As Justice Bradley said in *Boyd* v. *United States,* 116 U. S. 616, 630 (1886):

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security . . . they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security,

personal liberty and private property, where the right has not been forfeited. . . ."

More recently, in *Storer* v. *California,* 376 U. S. 483 (1963), the Court held that a hotel clerk could not consent to a search of a tenant's room. The Court said at 489: "It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." Furthermore, no "strained application of the law of agency" was to be permitted.

However, in this case, the circumstances of the joint possession and control, the particular relationship of the Mackiewiczes in respect to tax matters, and the nature of the Service's investigation all establish an agency relationship sufficient to make Mr. Mackiewicz competent to waive his wife's privilege, thereby making the search and seizure reasonable as to her. *Saratain* v. *United States,* 303 F. 2d 859 (9 Cir.), *cert. denied,* 371 U. S. 894 (1962); *United States* v. *Eldridge,* 302 F. 2d 463 (4 Cir. 1962).

First, Mrs. Mackiewicz had given her personal records to her husband for tax purposes. He had free access to the safe deposit box for the same reason. In the past, Mrs. Mackiewicz had never objected when he had used this privilege to examine the contents of the box or even pass her papers to another person for the purposes of preparing tax returns. In fact, in this instance she made no objection when she discovered that her husband had turned the papers over to the accountant. With this background, the possession of the papers and access to the box support the inference that he had the power, not to do with the papers what he willed, but to act reasonably with them in respect to tax matters.

Second, Mrs. Mackiewicz had traditionally left the preparation of the tax returns to her husband. She had nothing to do with them, other than signing her name. Thus, he was her agent for tax matters. Although one commentator has suggested that a wife would never make her spouse her agent to disclose incriminating evidence, 67 *Colum. L. Rev.* 130, 147 (1967), this is unrealistic. Mr. Mackiewicz was his wife's agent in this field in January, 1965, for better or worse, no matter where this agency might lead. It wasn't until long after the interview that Mrs. Mackiewicz attempted to sever this authority.

Third, if viewed from the Service's perspective (and in determining reasonableness this is necessary), the agents were making an investigation of a joint return. Therefore, from their standpoint, it was natural to seek the person who in fact completed the form and direct their questions to him. This Court has in fact gone so far as to hold that if there is joint criminal activity by a married couple, the less dominant partner (in a particular matter) can consent to a search of their property. *United States* v. *Publiese,* 153 F. 2d 497 (2 Cir. 1945). Moreover, since Mr. Mackiewicz could have expected to be as guilty as his wife of any fraud, there was no reason for the agents to suspect that he would be cavalier with his wife's property and rights. This is not a situation where the police convinced an innocent wife to allow a search of her criminal husband's property. *State* v. *Coolidge,* 106 N. H. 186, 208 A. 2d 322 (1965).

IV.

Mr. Mackiewicz further contends that her common law marital privilege was violated when Agent Harden testified as to certain financial facts told to him by her husband at the January 12, 1965 interview.

> ". . . The admissibility of evidence and the competency of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." F. R. Crim. P. 26.

At common law, the husband and wife were disqualified from testifying in a law suit in which his (or her) spouse was a party. This rule was based on three distinct principles: (1) the incompetency of the spouse to testify for the other; (2) the incompetency of the spouse to testify as to confidential information; and (3) the incompetency of either spouse to testify against the other.

Principle (1) was rejected in *Funk* v. *United States,* 290 U. S. 371 (1933), in which the Court recognized that this aspect of the rule was based on the universally ignored common law rule of disqualifying interested witnesses. Therefore, the rule was no longer needed.

Principle (2) is still vital, McCormick, *Evidence,* §§83, 84, but inapposite in this case. The facts related to the agent were of a financial nature, referring to the income and assets of the marriage. They were not confidential, and they were never meant to be confidential. *United States* v. *Ashby,* 245 F. 2d 684 (5 Cir. 1957).

Thus, it is only principle (3) which may be applicable. In *Hawkins* v. *United States,* 358 U. S. 74 (1958), the Court held that a wife, although willing to testify, could not testify against her husband. As Justice Black said at 77:

> "The basic reason the law has refused to pit wife against husband or husband against wife in a trial

where life and liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well."

The question here presents a variation of the *Hawkins* rule. May a husband's voluntary out-of-court statements, made when acting as agent for his wife, be repeated by a third person and used against his wife at a joint trial in which neither spouse consents to their use? Under these circumstances, we think so, for (a) since the statements were not actually testified to by the husband at trial, they did not jeopardize domestic peace, (b) since Mr. Mackiewicz testified, the danger of prejudicial hearsay is greatly reduced, and (c) the statements were made voluntarily when Mr. Mackiewicz was an implied agent for his wife.

This is not a case where the prosecution called the husband to the stand. If he had testified under those circumstances, the common law rule would have been violated. Here, however, we are one step removed from actual testimony. Therefore, there is no chance that we might be repulsed by a spouse actually testifying against his mate, *see* McCormick, *Evidence*, §66. Nor is there a chance that marital frictions will be aggrevated, 33 *Tul. L. Rev.* 884, 890-892 (1959), for there is the convenient buffer of the third person actually making the remarks. *United States* v. *Winfree*, 170 F. Supp. 659 (E. D. Pa. 1959); contra, *Peck* v. *United States*, 321 F. 2d 934 (9 Cir. 1963), *cert. denied*, 376 U. S. 954 (1964) (dictum); *Olennder* v. *United States*, 210 F. 2d 795 (9 Cir. 1954), *cert. denied*, 352 U. S. 982 (1957) (dictum).

Appendix B

Mrs. Mackiewicz further contends that since these are out-of-court statements, they are heresay. 8 Wigmore, *Evidence* §2232 (McNaughton Rev. 1961). However, the danger of hearsay statements is that the defendant does not have the opportunity to cross-examine the declarant. In this case, Mr. Mackiewicz took the stand, and therefore, if his wife had wanted to, she could have cross-examined him.

Furthermore, Mr. Mackiewicz had the implied authority of his wife to make the statements. As has been noted above, he was the implied agent for the family business in tax matters. Moreover, since they were partners in the income tax evasion, the statements are admissible under a standard exception to the hearsay rule. *United States* v. *Puglicse, supra; People* v. *Williams,* 127 N. E. 2d 505, 6 Ill. App. 2d 325 (1955). This exception is applicable if there is simply a "likelihood of an illicit association." *United States* v. *Ragland,* 375 F. 2d 471 (2 Cir. 1967). This was established when the Court had reason to suspect tax fraud on the joint returns.

Finally, this is not a case where a wife purposefully makes an incriminating statement against her husband. *United States* v. *Ashby, supra* (the statement was admitted in that case, for by the time of trial the couple was divorced). Rather, Mr. Mackiewicz, being a potential defendant at the time he answered the questions, had nothing to gain by revealing facts which would do harm to his wife.

Affirmed.

Appendix B

FEINBERG, *Circuit Judge* (concurring):

I join in the majority opinion, but as to Part II thereof, I concur because the way I read *Miranda* I do not believe that it applies to a situation with as few custodial aspects as this one, as my brother Moore has ably pointed out. However, if this analysis of *Miranda* is incorrect, and full warnings are required when an investigation has been referred to a special agent of the Intelligence Division of the Internal Revenue Service, I do not agree that this limited extension of *Miranda* will necessarily cause serious administrative difficulties.

APPENDIX C

Judgment and Commitment of the United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

WALTER P. MACKIEWICZ
No. CR. 11,970

On this 22nd day of January, 1968 came the attorney for the government and the defendant appeared in person and[1] by counsel.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a finding of guilty by the jury has been convicted of the offense of violation of Title 26, Sec. 7201 of the U.S. Code (filing false and fraudulent income tax returns) as charged[3] in four (4) counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

Appendix C

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] three (3) years on each of the four counts, to run concurrently, and is fined ten thousand dollars ($10,000.) on each count [total fine $40,000.]; execution of term of imprisonment shall be suspended after serving six (6) months, whereupon the defendant shall be placed on probation for a period of three (3) years. The defendant shall stand committed until the payment of the fine is made, or until otherwise discharged as provided by law.

Execution on payment of the fine is hereby stayed for thirty (30) days.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ M. JOSEPH BLUMENFELD
United States District Judge.

The Court recommends commitment to:[6]

.....
Clerk.

A True Copy Certified this 22nd day of January, 1968
(*Signed*) GILBERT C. EARL

Clerk.
(*By*) SYLVESTER H. MACKOWSKI
Deputy Clerk.

FILED
JAN 25 8 18 AM '68
U. S. DISTRICT COURT
NEW HAVEN, CONN.

APPENDIX D

Judgment and Order of Probation of the United States District Court

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

FLORENCE B. MACKIEWICZ
No. CR. 11,970

On this 22nd day of January, 1968, came the attorney for the government and the defendant appeared in person, and[1] by counsel.

IT IS ADJUDGED that the defendant has been convicted upon her plea of[2] not guilty and a finding of guilty by the jury of the offense of violation of Title 26, Sec. 7201 of the U.S. Code (filing false and fraudulent income tax returns) as charged[3] in four (4) counts and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant be fined five thousand dollars ($5,000.) on each of the four counts [total fine $20,-

Appendix D

000.] and is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year on each count, to run concurrently, execution of term of imprisonment is hereby suspended and the defendant is placed on probation for a period of three (3) years. The defendant shall stand committed until the payment of the fine is made, or until otherwise discharged as provided by law. Execution on payment of the fine is hereby stayed for thirty (30) days.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct herself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ M. JOSEPH BLUMENFELD
United States District Judge.

.....
Clerk.

A True Copy. Certifiied this 22nd day of January, 1968
(*Signed*) GILBERT C. EARL

Clerk.
(*By*) SYLVESTER H. MACKOWSKI
Deputy Clerk.

APPENDIX E

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of July one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALTER P. MACKIEWICZ and FLORENCE B. MACKIEWICZ,

Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

Appendix E

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed, that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk